

IN THE UTAH SUPREME COURT

UNIVERSITY OF UTAH, a body	:	
corporate and politic under Utah law,		
and J. BERNARD MACHEN, President	:	
of the University of Utah,		
	:	
Plaintiffs/Appellees,		
	:	Case No. 20030877-SC
v.		
	:	
MARK L. SHURTLEFF,		
Utah Attorney General,	:	
Defendant/Appellant.	:	

BRIEF OF DEFENDANT/APPELLANT

Appeal from the Judgment of the Third Judicial District Court, Salt Lake County,
Judge Robert K. Hilder

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**ORAL ARGUMENT AND PUBLISHED OPINION ARE REQUESTED
DEFENDANT - APPELLANT ATTORNEY GENERAL SHURTLEFF**

LIST OF ALL PARTIES

To the best of Attorney General Mark L. Shurtleff's knowledge, all interested parties appear in the caption of this Brief.

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Plaintiffs/Appellees,:

v.:Case No. 20030877-SC

MARK L. SHURTLEFF, :

Defendant/Appellant.:

BRIEF OF DEFENDANT - APPELLANT

STATEMENT OF JURISDICTION

This matter comes within the original jurisdiction of the Supreme Court of the State of Utah under Utah Code Ann. § 78-2-2(3)(j) (2002).

STATEMENT OF THE ISSUES

1. The University of Utah, an agency of the State of Utah, and its president are prohibited from establishing rules or policies pertaining to firearms that are contrary to the laws enacted by the Utah State Legislature.

STANDARD OF REVIEW: "In matters of pure statutory interpretation, an appellate court reviews a trial court's ruling for correctness and gives no deference to its legal conclusions." Stephens v. Bonneville Travel, Inc., 935 P.2d 518, 519 (Utah 1997). The district court's denial of the defendant's motion to dismiss is reviewed for correctness, granting no deference to the district court's ruling. First Equity Fed., Inc. v. Phillips Dev., L.C., 2002 UT 56, ¶11, 52 P.3d 1137; Pendleton v. Utah State Bar, 2000 UT 96, ¶5, 16 P.3d 1230

ISSUE PRESERVED BELOW. This issue was raised in the Defendant's motion to dismiss and the memorandum in support thereof. R. 22-23, 26-75, 384-98.

2. The University of Utah has no power or autonomy granted by the Constitution of the State of Utah that would permit it to disregard and nullify the general laws enacted by the State of Utah, even when such laws relate to the purposes and government of the University.

STANDARD OF REVIEW: Same as One, supra.

ISSUE PRESERVED BELOW: Same as One, supra.

DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES

All such provisions are set forth verbatim in Addendum A to this brief.

STATEMENT OF THE CASE

On May 12, 2003, the plaintiffs filed this action against Attorney General Mark Shurtleff. R. 1-18. Plaintiffs' complaint challenged Attorney General Shurtleff's interpretation of Utah's firearms law. Plaintiffs claim that the University of Utah's internal firearms policy does not violate state law. In the alternative, they claim that if it does violate the law, the University of Utah has constitutional authority to create its own policies in contravention of state law. Id.

Attorney General Shurtleff filed a motion to dismiss (R. 22-23, 26-75, 384-98) and the plaintiffs filed a motion for summary judgment. R. 86-88, 262-376.

The trial court granted the plaintiffs' motion for summary judgment by a Judgment entered on September 19, 2003. R. 421-34. Defendant filed his notice of appeal on October 16, 2003. R. 438-39.

STATEMENT OF RELEVANT FACTS

The University of Utah began as the University of the State of Deseret. It was created by the General Assembly of the State of Deseret (Territorial Legislature of Utah) by an ordinance approved on February 28, 1850. 1851 Laws and Ordinances of the State of Deseret (Utah) 93-95. R. 41-43. Control over the University was given to a Chancellor and twelve Regents who were "chosen by the joint vote of both Houses of the General Assembly." R. 42. Its name was not changed to the University of Utah until 1892. 1892 Utah Laws 8-11. R. 44-47.

Along with changing the name of the University, the 1892 law also stated that the University of Utah "shall be deemed a public corporation and be subject to the laws of Utah, from time to time enacted, relating to its purposes and government." R. 44. In 1898, this provision was amended to read that the University of Utah "shall be deemed a public corporation and shall be subject to the laws of this state, existent or hereafter enacted, relating to its purposes and government." Revised Statutes of Utah § 2291 (1898). R. 48-55. The Board of Regents of the University of Utah had the "power to enact by-laws and regulations for all concerns of the institution, not inconsistent with the laws of the state." Revised Statutes of Utah § 2295 (1898) (emphasis added). At the time of statehood, the governing board of the University of Utah was appointed by the governor with the advice and consent of Utah's senate. Revised Statutes of Utah § 2064 (1898).

Utah's Enabling Act provided a land grant for the already existing University of Utah (28 Stat. 107, § 8 (1894)) but also expressly provided that the "university provided

for in this Act shall forever remain under the exclusive control of said State." 28 Stat. 107, § 11 (1894). Utah's constitution called for all of the institutions and property of the Territory of Utah to become "the institutions and property of the State of Utah" upon its adoption. Proceedings Constitutional Convention 1895 at 1878. R. 68.

Utah's original constitution did not create or confer any new powers or authority to the University of Utah, but rather stated that:

The location and establishment by existing laws of the University of Utah, and the Agricultural College [Utah State University] are hereby confirmed, and all the rights, immunities, franchises and endowments heretofore granted or conferred, are hereby perpetuated unto said University and Agricultural College respectively.

Utah Const. art. X, § 4 (1896); R. 66. The debate on this section makes it clear that the provision was meant to mandate the continued existence of the college and university as two separate institutions of higher education, one located in Salt Lake City and the other in Logan. R. 56-65.

Article X, Section Four of Utah's Constitution remained unchanged until 1986. In that year, the current version of the section was proposed and adopted.

The general control and supervision of the higher education system shall be provided for by statute. All rights, immunities, franchises, and endowments originally established or recognized by the constitution for any public university or college are confirmed.

Utah Const. art. X, § 4 (1986).

The University of Utah purports to prohibit its students and employees from possessing or using a firearm on University premises. It also purports to prohibit its employees from possessing or using a firearm while conducting University business off

campus. These policies contain an exemption only for those expressly authorized by the University to carry a firearm. R. 5, ¶¶ 13-16.

Mark L. Shurtleff is the duly elected Attorney General of the State of Utah. R. 3, ¶ 7. Among his duties is the constitutional one to be the legal advisor to Utah's state officers. Utah Const. art. VII, § 16. By statute, Attorney General Shurtleff has the responsibility to "give the attorney general's opinion in writing and without fee to the Legislature or either house, and to any state officer, board, or commission, and to any county attorney or district attorney, when required, upon any question of law relating to their respective offices." Utah Code Ann. § 67-5-1(7) (Supp. 2003). A formal opinion of the Attorney General, given pursuant to this statute, "constitutes the Attorney General's carefully, considered judgment as to what the law requires in the circumstances presented" but it "has no legal binding effect on the requesting officer." Attorney General Policy Manual §5.10(D)(2). R. 69-70.

On October 26, 2001, the President of Utah's Senate and the Speaker of its House of Representatives requested a formal opinion from Attorney General Shurtleff as to the validity under Utah law of Utah's Department of Human Resource Management's (DHRM) Rule 477-9-1(5) (prohibiting state employees from carrying firearms "in any facility owned or operated by the state, or in any state vehicle, or at any time or any place while on state business."). On November 30, 2001, Attorney General Shurtleff responded by issuing Utah Attorney General's Opinion No. 01-002. R. 7-8, ¶ 24; Utah Attorney General's Opinion No. 01-002 (R. 71-75). Attorney General Shurtleff's opinion found the

questioned DHRM rule to be unenforceable. Id. In a footnote to his opinion, Attorney General Shurtleff stated:

The administrative rule that is the subject of your inquiry, R. 477-9-1(5) may not be the only rule that has been promulgated without authorization from the Legislature. For instance, your letter requesting this opinion had as an attachment, Formal Opinion No. 98-01 from the Office of Legislative Research and General Counsel. That opinion concludes that the University of Utah's policy prohibiting students and faculty from possessing firearms on University premises was contrary to law. [As of this date, those policies are still listed in the University of Utah Policy and Procedures Manual: Policy 8-10, Rev. 3, July 14, 1997 and Policy 2-9, Rev. 7, July 13, 1998 Section IV Subsection F.] I agree with the reasoning and conclusions of the Legislative General Counsel that those policies are unlawful and in violation of the laws of this State.

R. 74, n.13.

Plaintiffs allege that "[s]tudents and members of the University's staff have threatened to bring firearms to campus." R. 2, ¶ 2. That "certain members of the Utah Legislature proposed legislation which would permit the Legislature's Executive Appropriations Committee to reduce a state agency's administrative budget by up to 50 percent based on a determination that the agency policies violate a state statute. The purpose of this proposal, which was narrowly defeated in the Utah House of Representatives, was to punish the University for enforcing the Internal University Firearms Policy in the face of the Attorney General's opinion." Id., R. 9, ¶ 28(b).

In 2002, the Utah State Legislature enacted Senate Bill 170, reauthorizing administrative rules, which expressly stated that it was not reauthorizing the University of Utah's internal university firearms policy. R. 9, ¶ 28(a). Plaintiffs allege that some students have expressed "their desire to carry firearms on campus" and some law students have formed an organization ("College of Law Gun Rights Advocates") and contend that

the plaintiffs' policies are illegal. R. 10, ¶ 29. One student wrote a letter to a newspaper calling the plaintiffs' policies illegal and "urging students who owned concealed weapons to carry them." R. 10, ¶ 30. Plaintiffs also allege that some employees of the University have threatened to bring firearms onto the University campus contending that the plaintiffs' policies are illegal and unenforceable. R. 8-9, ¶ 27.

SUMMARY OF ARGUMENT

Utah's legislature has reserved to itself "all authority to regulate firearms." Utah Code. Ann. § 78-27-64(1) (2002). This absolute reservation prohibits the University of Utah from creating its own, separate, firearms policy. The trial court erred in reading into the legislature's retention of authority a provision that it only applied to the criminal law, language that is not found in the statutes. The trial court's ruling should be reversed and this action remanded with instructions that it be dismissed with prejudice.

The plaintiffs also claim that the University of Utah is an autonomous constitutional entity that can disregard Utah law as it relates to the government and purposes of the University. This claim is not supported by Utah's constitution, its current and historic statutes, or the decisions of this Court. The University of Utah, since its founding in 1850, has been "subject to the laws of Utah, from time to time enacted, relating to its purposes and government." 1892 Utah Laws 8.

ARGUMENT

I. THE UNIVERSITY OF UTAH'S FIREARMS POLICIES ARE CONTRARY TO UTAH LAW

In interpreting statutory language, this Court has explained:

First, our primary goal in interpreting statutes is to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve. We need look beyond the plain language only if we find some ambiguity. "In analyzing a statute's plain language, we must attempt to give each part of the provision a relevant and independent meaning so as to give effect to all of its terms." However, if we find a provision that causes doubt or uncertainty in its application, we must "analyze the act in its entirety and 'harmonize its provisions in accordance with the legislative intent and purpose.'" Nevertheless, a statute's unambiguous language "may not be interpreted to contradict its plain meaning."

State v. Burns, 2000 UT 56, ¶25, 4 P.3d 795 (citations omitted).

Under Utah law, plenary power in determining what the law should be is vested in the state's legislature. "The Utah Constitution is not one of grant, but one of limitation. The state having thus committed its whole lawmaking power to the legislature, excepting such as is expressly or impliedly withheld by the state or federal constitution, it has plenary power for all purposes of civil government." Utah Sch. Bd. Assoc. v. Utah State Bd. of Educ., 2001 UT 2, ¶11, 17 P.3d 1125 (internal quotations omitted). In the area of firearms, the legislature's power has not been limited by the constitution. "[N]othing herein shall prevent the legislature from defining the lawful use of arms." Utah Const. art. I, § 6.

Attorney General Shurtleff has been sued because of his legal opinion that the University of Utah's firearms policies are invalid. Absent an express grant of authority from the Utah State Legislature, the University of Utah is without the power to regulate firearms. Any policy it enacts or seeks to enforce on this issue is invalid and without

effect. Only the uniformly applicable laws enacted by the Utah State Legislature regulate if, when or how firearms may be introduced onto the campus of the University of Utah.

- (1) The individual right to keep and bear arms being a constitutionally protected right, the Legislature finds the need to provide uniform laws throughout the state. Except as specifically provided by state law, a citizen of the United States or a lawfully admitted alien shall not be:
 - (a) prohibited from owning, possessing, purchasing, selling, transferring, transporting, or keeping any firearm at his place of residence, property, business, or in any vehicle lawfully in his possession or lawfully under his control; or
 - (b) required to have a permit or license to purchase, own, possess, transport, or keep a firearm.
- (2) This part is uniformly applicable throughout this state and in all its political subdivisions and municipalities. All authority to regulate firearms shall be reserved to the state except where the Legislature specifically delegates responsibility to local authorities or state entities. Unless specifically authorized by the Legislature by statute, a local authority or state entity may not enact or enforce any ordinance, regulation, or rule pertaining to firearms

Utah Code Ann. § 76-10-500 (2003) (emphasis added).

Pursuant to its authority, the Utah Legislature has seen fit to keep for itself the right to regulate firearms. "[A]ll authority to regulate firearms is reserved to the state through the Legislature." Utah Code Ann. § 78-27-64(1) (2002). In the interest of uniformity, only the legislature has been authorized to regulate firearms. The trial court, without addressing this particular civil statute, held that the legislature had only retained for itself exclusive authority to determine the criminal law concerning firearms. R. 431. The trial court, similarly, held that the legislature's broad retention of authority only went to the establishment of standards for those who could obtain concealed weapons permits. R. 431-32.

The trial court erred in not reading all of the firearms statutes of Utah in pari materia.

Statutes are considered to be in pari materia and thus must be construed together when they relate to the same person or thing, to the same class of persons or things, or have the same purpose or object. If it is natural or reasonable to think that the understanding of the legislature or of persons affected by the statute would be influenced by another statute, then those statutes should be construed to be in pari materia, construed with reference to one another and harmonized if possible.

Utah County v. Orem City, 699 P.2d 707,709 (Utah 1985) (footnotes omitted); Miller v. Weaver, 2003 UT 12, ¶17, 66 P.3d 592 (“When interpreting a statute, this court looks first to the statute's plain language to determine the Legislature's intent and purpose. We read the plain language of the statute as a whole, and interpret its provisions in harmony with other statutes in the same chapter and related chapters.”) (citation omitted) .

When properly read together, the statutes concerning firearms make it clear that it was the intent of Utah’s Legislature to prohibit all regulation of firearms, criminal and civil, by local authorities and state agencies such as the University of Utah, unless expressly authorized by statute. This reservation of authority on the part of the legislature applies not only to criminal law and the issuance of concealed weapons permits, but extends expressly to the question of where, and under what circumstances, firearms may be carried on public and private land.

In the 2003 General Session, the legislature amended the laws of Utah to expressly permit concealed weapons permit holders to carry firearms into the public schools of Utah, which had previously been prohibited. Utah Code Ann. § 76-10-505.5(3) (2003). If the legislature did not intend to reserve the right to determine where and when firearms

could be restricted on public and private property, there would have been no need for a statute which expressly authorizes private citizens and churches to prohibit the possession of firearms in private residences and houses of worship. Utah Code Ann. § 76-10-530 (2003). Nor would the legislature have seen fit to expressly prohibit a landlord from restricting a renter or lessee's ability to possess a firearm in the rented residence. Id.

Attorney General Mark Shurtleff's Formal Opinion 01-002 cites numerous similar express grants of permission to ban firearms by the legislature. These include: municipalities, mental health facilities, law enforcement facilities, correctional facilities, the Olympic Public Safety Commander, airports, courts, inns, buses and bus terminals. R. 72-74. "Because the Legislature has provided such limited statutory authorization to regulate firearms to only a few entities, all other ordinances, regulations, and rules pertaining to firearms that are promulgated by any other local authorities or state entities would be illegally promulgated." R. 74.

Plaintiffs claim that the University of Utah has been authorized by the Utah Board of Regents to create an internal firearms policy. R. 4, ¶ 10. In support of this assertion, the plaintiffs rely on Utah Code Ann. § 53B-1-103(2)(a) (Supp. 2003), which vests the Board of Regents "with the control, management, and supervision of the institutions of higher education." What plaintiffs neglect is that this authority is limited. The statute also provides that the Board's control and management must be "in a manner consistent with the policy and purpose of this title and the specific powers and responsibilities granted to it." Id. One specific restriction on the authority that the Board of Regents can grant to the University of Utah is found in Utah Code Ann. § 53B-3-103 (Supp. 2003).

Far from providing the Board or the University of Utah the power to regulate firearms, this statute expressly prohibits the same, with a single exception not relevant here:

The board may. . . authorize higher education institutions to establish no more than one secure area at each institution as a hearing room as prescribed in Section 76-8-311.1, but not otherwise restrict the lawful possession or carrying of firearms.

Utah Code Ann. § 53B-3-103(2)(a)(ii) (Supp. 2003) (emphasis added).

The plain meaning of Utah's laws concerning firearms is clear from the statute that the trial court failed to address. "[A]ll authority to regulate firearms is reserved to the state through the Legislature." Utah Code Ann. § 78-27-64(1) (2002). Indeed, the statute's title is "Regulation of firearms reserved to state." This is not a criminal statute, so the trial court erred when it found that Utah's Legislature has only retained to itself the authority over creating criminal statutes concerning firearms. Instead this statute is found in the miscellaneous provisions chapter of Utah's Judicial Code which it shares with numerous other provisions that are clearly civil in nature. The plain and unambiguous language of this statute reserves all authority to regulate firearms to the Utah Legislature. Its civil nature is shown by its second subsection, which prohibits the State of Utah and its political subdivisions from bringing certain kinds of civil lawsuits concerning firearms.

The plain language of Utah's statutes shows that the Utah State Legislature has retained complete authority over the regulation of firearms. The legislature, and not the University of Utah, has the authority to determine where and when firearms can be taken onto public and private property. The legislature has expressly refused to give such authority to the Utah Board of Regents and the University of Utah. The plaintiffs were without authority to create their own internal firearms policy. For this reason defendant

Attorney General Mark Shurtleff asks this court to reverse the trial court's decision in this matter and to order the trial court, on remand, to dismiss the plaintiffs' complaint with prejudice.

If, for any reason, this Court were to look beyond the plain language of the statutes in question, the most appropriate evidence is Senate Bill 170 (2002) that demonstrates that the Utah Legislature intended that the University of Utah not be permitted to create its own firearms policies. In their complaint, the plaintiffs admitted that the Utah State Legislature enacted this bill, reauthorizing administrative rules, with express language claiming to not reauthorize the University of Utah's internal university firearms policy. R. 9, ¶28(a). Without consideration of whether this enactment was effective in overturning the University's firearms policy, it clearly demonstrated the intention of not just one or two legislators, but of the Utah State Legislature as a whole. Defendant submits that the plain intent of the Legislature of the State of Utah is that the University of Utah not be authorized to enact its own firearms policy.

II. UNDER UTAH LAW, THE UNIVERSITY OF UTAH IS NEITHER SELF-GOVERNING NOR AUTONOMOUS

Having mistakenly found that the University's policy did not violate Utah law, the trial court did not reach this issue. But this Court should do so for the guidance of the trial court. Bair v. Axiom Design, L.L.C., 2001 UT 20, ¶22, 20 P.3d 388 ("where an appellate court finds that it is necessary to remand a case for further proceedings, it has the duty of 'pass[ing] on matters which may then become material.'")

The University of Utah claims to be autonomous and self-governing based upon its reading of Utah Const. art. X, § 4. Plaintiffs claim that the University has the authority to

ignore the pronouncements of the Utah State Legislature which conflict with the University's view of good educational public policy. As shown by the undisputed facts, this reading of Utah's Constitution is erroneous. At the time of the enactment of Utah's constitution, the University of Utah was expressly "subject to the laws of Utah, from time to time enacted, relating to its purposes and government." 1892 Utah Laws 8. Far from granting any form of autonomy to the University, Utah's Constitution simply continued the rights and privileges already provided by statute. This included the continuing requirement that the University be subject to the laws of Utah from time to time enacted concerning both its government and its purposes. Indeed, the University of Utah's by-laws and regulations were prohibited from being "inconsistent with the laws of the state." Revised Statutes of Utah § 2295 (1898). No authority was ever given to the University that would permit it to ignore or alter the laws of the State of Utah.

Defendant submits that this issue has already been decided against the plaintiffs, several times, by this Court.

As early as 1909, this Court rejected the idea that the University of Utah was an independent entity outside the control of the state. In State v. Candland, 36 Utah 406, 104 P. 285, 293 (1909), this Court held that the indebtedness of the University of Utah was also the debt of the State of Utah.

While it is true that the university is a corporation and thus constitutes a legal entity with a limited capacity, yet, when all of the provisions of law, which in some way relate to and affect the government of the university are considered and construed together, it is made very clear that the corporation designated the University of Utah was created and exists for the sole purpose of more conveniently governing and conducting the educational institution called the "University." The university is clearly a state institution, and is so treated, since the members constituting its governing

board are all appointed by the Governor with the consent of the senate, and the board regularly reports to the Governor. Moreover, the corporation holds all the property in trust merely. In fact the property belongs to the state of Utah. We think no one will seriously contend that the corporation styled the "University of Utah" has the power or authority, without the consent of the state of Utah, to dispose of any property.

In Spence v. Utah State Agr. College, 119 Utah 104, 225 P.2d 18 (1950) (legislature had authority to alter controlling board of agricultural college), this Court upheld the ongoing authority of the legislature to control both the state agricultural college and the University of Utah.

A doctrine firmly established in the laws of most jurisdictions is that a state constitution is in no manner a grant of power, it operates solely as a limitation on the legislature, and an act of that body is legal when the constitution contains no prohibition against it. This state is committed to that doctrine.

225 P.2d at 23. This Court expressly rejected the idea that the applicable section of Utah's constitution had created a constitutional autonomous corporation.

Most significantly, this Court expressly rejected the very autonomy now claimed by the University of Utah in University of Utah v. Board of Examiners of State of Utah, 4 Utah 2d 408, 295 P.2d 348 (1956). This action dealt with the University's claim that it was fiscally, and otherwise, independent of any control by the Legislature or other boards, commissions or officers of the State of Utah as a constitutionally-created corporation. In rejecting this argument, this Court explained:

It is inconceivable that the framers of the Constitution in light of the provisions of Sections 1, 5 and 7 of Article X, and the provision as to debt limitations, intended to place the University above the only controls available to the people of this State as to the property, management and government of the University. We are unable to reconcile respondent's position that the University has a blank check as to all its funds with no pre-audit and no restraint under the provisions of the Constitution requiring the

State to safely invest and hold the dedicated funds and making the State guarantor of the public school funds against loss or diversion. To hold that respondent has free and uncontrolled custody and use of its property and funds, while making the State guarantee said funds against loss or diversion is inconceivable. We believe that the framers of the Constitution intended no such result.

Appellants and respondent agree that the interpretation which we put on Article X, Section 4 will determine the other questions presented. It has not been urged by respondent that if the University is subject to legislative control that any of the enactments complained of are invalid. Respondent's objection is that the Legislature had no power to confer on the Boards, Commissions and Officers the authority to supervise and control the University. Since no complaint is made against the defendants named, except that the duties being performed by them are in violation of respondent's constitutional rights because the Legislature could not legally invest said defendant with authority to infringe upon the rights secured by the Constitution, it must follow that the objections of respondent as to the acts complained of must fall by reason of the conclusion reached herein; that the University is a public corporation not above the power of the Legislature to control, and is subject to the laws of this State from time to time enacted relating to its purposes and government.

295 P.2d at 370-71 (emphasis added). Indeed, this Court determined that "[t]he entire thought of the convention in respect to the University and Agricultural College was on the question of uniting them or leaving them separate, and on the question of location. . . . Nowhere in the proceedings can an expression of intent be found that the Legislature should forever be prohibited from acting in any matters dealing with the purposes and government of the University except its establishment and location." *Id.* at 368.

In First Equity Corporation of Florida v. Utah State University, 544 P.2d 887 (Utah 1975), this Court applied the holding of Board of Examiners to the agricultural college (now known as Utah State University). "USU is a corporation and thus constitutes a legal entity with limited capacity. It was created and exists for the sole purpose of more conveniently governing and conducting the educational institution. It is

a state institution, a public corporation not above the power of the Legislature to control and is subject to the laws of this state from time to time enacted relating to its purposes and government." 544 P.2d at 889. In Petty v. Utah State Board of Regents, 595 P.2d 1299, 1300-1 (Utah 1979), this Court again relied upon Board of Examiners for the proposition that the University of Utah was subject "to the general legislative control and budgetary supervision as are other departments of state government."

More recently, the United States District Court for the District of Utah relied upon Board of Examiners in determining that the University of Utah was an arm of the state for Eleventh Amendment immunity purposes. Pharm. and Diagnostic Serv., Inc. v. Univ. of Utah, 801 F.Supp. 508, 512 (D. Utah 1990) ("[t]hus, the state's highest court has indicated in unequivocal terms that the University acts as a state-created, state-financed entity with a severely constricted degree of autonomy.") (footnote omitted). The Tenth Circuit has also followed Board of Examiners in determining that the "University is not autonomous but rather is a state-controlled entity." Watson v. Univ. of Utah Med. Ctr., 75 F.3d 569, 575 (10th Cir. 1996).

The 1986 amendment to section four did not create any new rights or powers for the University of Utah. Instead it only confirmed those "originally established or recognized by the constitution." Utah Const. art. X, § 4. Utah's constitution, its statutes (current and historic) and the decisions of the courts have never provided the University of Utah with the autonomy it seeks. Both Utah's courts and the federal courts agree that the University of Utah is subject to the control of Utah's Legislature. It is not a constitutionally-created autonomous entity. Instead, the University is subject to the laws

enacted from time to time by Utah's Legislature and to the controls and constraints placed upon it concerning its purposes and government. Nothing in the Utah Constitution authorizes the University of Utah to nullify Utah's laws concerning firearms and establish its own policies in contravention of the law. The University has no right to create policy contrary to legislative enactments and its claims to such authority should have been dismissed with prejudice by the trial court.

CONCLUSION

For the above stated reasons, Attorney General Mark L. Shurtleff asks this Court to reverse the trial court's grant of summary judgment to the plaintiffs. Defendant urges the Court to remand this action to the trial court with instructions that it be dismissed with prejudice.

Respectfully submitted this _____ day of January, 2004.

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CERTIFICATE OF SERVICE

I hereby certify that I mailed two true and exact copies of the foregoing Brief of Defendant - Appellant, postage prepaid, to each of the following on this the _____ day of January, 2004:

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